87-425

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SAMUEL M. LONGIOTTI and BETTY C. LONGIOTTI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a taxpayer entitled to relief from the "double disallowance of a deduction" under the mitigation provisions of I.R.C. §§ 1311-1314 when the required "determination" under I.R.C. § 1313(a) disallows the deduction in one year for some reason *other than* that it should have been taken/allowed in another year?

2. Can a court grant a taxpayer or the government relief from the expiration of the statute of limitations* under the special mitigation provisions of I.R.C. §§ 1311-1314 in the same action that gives rise to the "determination" that under I.R.C. § 1311(a) is a precondition for a mitigation relief, or must the party seeking relief bring an entirely separate action?

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* The Petitioners argued in the district court and the court of appeals that the applicable limitations period had not expired prior to the filing of the refund claim. Both courts held otherwise and the decision of the Fourth Circuit is in accordance with the only other court of appeals decision on this issue. *Mar Monte Corporation v. United States*, 503 F.2d 254 (9th Cir. 1974). Accordingly, the Petitioners do not seek the Court's review on this issue, but wish to preserve the opportunity to argue the merits in the event this Petition is granted.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 819 F.2d 65 (4th Cir. 1987) (Appendix A). The opinion of the United States District Court for the Middle District of North Carolina is reported at 635 F. Supp. 840 (M.D.N.C. 1986) (Appendix B).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fourth Circuit was entered May 19, 1987. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on June 15, 1987, and this petition is being filed within ninety days of that date. The

jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1311 through 1314 of the Internal Revenue Code of 1954 (26 U.S.C. §§ 1311-1314) are reproduced as Appendix E.

STATEMENT OF THE CASE

The facts in this income tax refund suit brought pursuant to 28 U.S.C. § 1346(a)(1) were fully stipulated by the parties prior to the grant by the district court of the government's motion for summary judgment. The facts are summarized on the charts attached as Appendix F to this Petition. Below is a brief narrative of those facts.

Petitioners filed a federal income tax return for 1972 reporting losses that offset their income and thus reported no taxable income. One of the Petitioners was a partner in a partnership that owned a large regional shopping mall in Raleigh, North Carolina (the "Mall") and most of the reported losses represented his share of the interest and depreciation deductions attributable to the Mall.

In 1973 and 1974, Petitioners reported net operating losses of $912,420 and $2,157,435, respectively, as a result of his interest in the Mall and other real estate ventures. The tax law, then and now, allows such losses to be carried back three years and utilized as net operating loss deductions (hereinafter "NOLs") against income the taxpayer may have had in the three preceding years. I.R.C. § 172. Because Petitioners had no taxable income in 1970, 1971 and 1972 (or so they thought), they could not avail themselves of this provision to carry back the 1973 and 1974 NOLs.

Nevertheless, Petitioners subsequently received from the IRS a statutory notice of deficiency in income taxes dated November 17, 1975, claiming that they owed ap-

proximately $324,000 in income tax for 1972. This deficiency notice was based primarily upon the IRS's contention that the Mall was not owned by the partnership in which one of the Petitioners was a partner, but rather was owned by a corporation. Therefore, the IRS contended that the Petitioners could not deduct any interest and depreciation with respect to the Mall. The Petitioners filed a petition in the U.S. Tax Court for redetermination of the deficiency, contending that although the legal title to the Mall was held by a corporation, the corporation held title as agent for the partnership merely to enable the investors to obtain a mortgage loan to construct the Mall. A mortgage loan to a partnership at the then-prevailing market rate of interest would have been usurious under North Carolina law. The Court last term granted certiorari to resolve a conflict in the Circuits on this precise issue. *Commissioner v. Bollinger*, 807 F.2d 65 (6th Cir. 1986), *cert. granted*, 107 S. Ct. 3183 (June 8, 1987).

Not only can NOLs be carried back three years, but if there is not sufficient income in the three years preceding the loss year, then (and only then) the NOLs can be carried forward for up to five years following the loss year.[1] While the 1972 Tax Court case was pending, Petitioners reported positive taxable income in 1976 and 1978, as illustrated on the chart at Appendix F. Thus, Petitioners carried forward some of the 1973 NOLs as deductions against this later income. Nevertheless, by the end of 1979 it became clear that Petitioners would not have sufficient income in the five-year carryforward period to absorb all of their 1973 and 1974 NOLs. Accordingly, Petitioners decided upon the advice of their former counsel to settle the 1972 Tax Court case rather than incur further litigation expense, thinking that the 1973 and 1974 NOLs that would otherwise expire unused

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[1] The five-year carryforward period applied to the 1973 and 1974 losses. Losses arising in years ending after December 31, 1975, can be carried forward 15 years. I.R.C. § 172(b)(1)(B).

could be carried back and used as deductions against the additional taxable income that would be created in 1972 as a result of the settlement. The settlement was evidenced by a document whereby Petitioners and the IRS stipulated that the Tax Court enter its decision finding a deficiency in tax for 1972 of $187,120.22. The settlement of the case, the agreed upon deficiency amount and the decision of the Tax Court entered pursuant to the settlemen were not based upon any consideration of the NOLs. Stipulation ¶ 10, Fourth Circuit Joint Appendix at pages 21-22.

On December 13, 1979, Petitioners' former counsel mailed to the IRS counsel the stipulated decision documents executed by Petitioners implementing the settlement of the 1972 Tax Court case. *On that same day*, former counsel mailed to the Internal Revenue Service Center, Memphis, Tennessee, IRS Form 1045, Application for Tentative Refund, seeking to apply the 1973 and 1974 NOLs as carrybacks to 1972 in order to reduce the tax liability as agreed to in the settlement of the 1972 Tax Court case. In his cover letter dated December 13, 1979, former counsel explained the situation as follows:

> There is enclosed herewith form 1045, application for tentative refund with respect to the above referenced taxpayers. The application relates to the year ending December 31, 1972.
>
> Taxpayers have recently executed a decision document for filing with the United States Tax Court, wherein it is stipulated that there are deficiencies in income taxes due from the taxpayers for the taxable years 1971 and 1972 in the amounts of $4,609.58 and $187,120.22, respectively.
>
> Taxpayers incurred substantial losses in 1973 and 1974 and the enclosed application is filed pursuant to the provisions of Section 6511(d)(2), and other related provisions of the Internal Revenue Code.
>
> The application is for a tentative credit of taxes due for the year 1972 in the amount of $172,467.49,

arising from net operating losses incurred in 1973 and 1974.

The IRS denied the Form 1045 Application in a letter dated December 31, 1979. On January 3, 1980, the Tax Court entered its decision in the 1972 Tax Court case finding a deficiency of $187,120.22 per the settlement.

On November 30, 1982, Petitioners paid $313,594.81 in tax and interest resulting from the settlement of the 1972 Tax Court case. On October 3, 1984, Petitioners filed a claim for refund, claiming that the 1973 and 1974 NOLs should be allowed as deductions against the 1972 income. The claim was denied in a letter from the IRS dated November 6, 1984. Pursuant to 28 U.S.C. § 1346 (a)(1), Petitioners brought this refund suit in district court on January 30, 1985.

The government argued that Petitioners' claim for refund was untimely because it was not made within 39½ months after the end of the 1973 and 1974 loss years as provided in I.R.C. § 6511(d)(2)(A). Petitioners argued that the claim was timely under I.R.C. § 6511(a) because it was made within two years from the date the tax was paid. The district court and the Fourth Circuit found for the government on this issue. The Fourth Circuit's position on this issue is in accord with that of the Ninth Circuit and therefore Petitioners do not seek the Court's review of this issue. *Mar Monte Corporation v. United States*, 503 F.2d 254 (9th Cir. 1974).

Petitioners also argued, however, that even if the limitations period relied upon by the IRS had expired, the refund claim was not untimely because the special "mitigation" provisions found at I.R.C. §§ 1311-1314 should apply. Specifically, Petitioners argued that the three elements necessary for mitigation relief were satisfied as follows:

1. The final disallowance of Petitioners' October 3, 1984, claim for refund for 1972 constituted a "determination" as required by I.R.C. § 1313(a)(3)(B).

2. The determination had the effect of a "double disallowance of a deduction," thus giving rise to one of the seven "circumstances of adjustment" in which mitigation applies. I.R.C. § 1312(4).

3. At the time Petitioners initially claimed the denied deductions by filing the IRS Form 1045 with the IRS Service Center on December 13, 1979, the applicable limitations period had not expired because as a matter of law Petitioners could have raised the NOL deductions in the Tax Court case, the decision of which did not become final until January 3, 1980. *Cooper v. Commissioner*, 197 F.2d 951 (4th Cir. 1952). Thus, the "necessary condition" element of I.R.C. § 1311(b)(2)(B) was satisfied.

The Fourth Circuit assumed that the first and third elements were present, but held that the second element was not present in that the denial of Petitioners' NOL deductions for 1972 did not have the effect of a double disallowance of a deduction.

REASONS FOR GRANTING THE WRIT

I. OVERVIEW

Other than declaring that there had been no double disallowance of a deduction, the Fourth Circuit did not expressly state the reason it denied Petitioners' claim for mitigation relief, instead spending most of the opinion on its explanation of why the statute of limitations had expired on Petitioners' claim for refund. Nevertheless, based upon the arguments before it, there could have been only two reasons for the court of appeals to deny mitigation relief. Specifically, the Fourth Circuit necessarily answered either the first Question Presented "no," or the second Question Presented "no." In the first instance, the Fourth Circuit's mitigation holding would conflict with the Seventh Circuit's decision in *Olin-Mathieson Chemical Corp. v. United States*, 265 F.2d 293 (7th Cir. 1959), and in the second instance its holding

would conflict with the Tenth Circuit's holding in *J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227 (10th Cir. 1981). While the Fourth Circuit's decision does not necessarily conflict with *both* of these decisions, it necessarily conflicts with one or the other. In each case, the conflict is not theoretical or "in principle," but is a direct conflict between the holding in the earlier case, as applied to the facts in Petitioners' case. The remainder of this Petition describes in detail the mitigation issues before the Fourth Circuit that formed the basis of its decision (II.A.), the conflict with *Olin-Mathieson* (II.B.) and the conflict with *J.B.N. Telephone* (II.C.). Part II.D. summarizes the interrelated nature of the conflicts and concludes that the most plausible interpretation of the basis for the Fourth Circuit's decision below was a conflict with *J.B.N. Telephone* on the application of the *Benenson* rule—whether a court can grant a taxpayer or the government mitigation relief from the expiration of the statute of limitations under the special mitigation provisions of I.R.C. §§ 1311-1314 in the *same action* that constitutes the "determination," which under I.R.C. § 1311(a) is a statutory precondition for that relief. The majority view, first announced by the Second Circuit in *Benenson v. United States*, 385 F.2d 26 (2d Cir. 1967), is that the party seeking mitigation relief must institute a second court action after the "determination" in order to secure relief. *See also Republic Petroleum Corp. v. United States*, 613 F.2d 518, 527 (5th Cir. 1980) (expressly adopting the *Benenson* rule). *Contra J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227, 237 (10th Cir. 1981) (expressly refusing to follow the *Benenson* rule). Part III. describes several recent examples of the application of the *Benenson* rule, illustrating the significant and recurring problems the rule poses for lower courts in implementing the equitable and remedial purposes of the mitigation provisions. For these reasons, the Court should grant this Petition.

II. THE DECISION BELOW CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *OLIN-MATHIESON* ON WHAT CONSTITUTES A DOUBLE DISALLOWANCE OF A DEDUCTION UNDER I.R.C. § 1312(4), AND CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT IN *J.B.N. TELEPHONE* ON WHETHER A COURT CAN GRANT MITIGATION RELIEF UNDER I.R.C. § 1311(a) IN THE SAME ACTION THAT CONSTITUTES THE STATUTORILY REQUIRED "DETERMINATION"

A. The Basis Of The Fourth Circuit's Mitigation Holding

The Fourth Circuit's entire analysis of the double disallowance issue was as follows:

> Assuming, *arguendo*, that a "determination" has been made, taxpayers urge that the denial of their refund claim burdens them with a double disallowance. Taxpayers assert that, although the 1973 and 1974 NOLs were carried forward to 1976, 1978 and 1979, the NOLs were not exhausted. They argue that the effect of disallowing the NOLs' use in 1972 is to disallow the deduction of the unused portion of the 1973 NOL after 1978 and of the 1974 NOL after 1979.
>
> This situation, however, does not constitute a double disallowance within the meaning of section 1312(4). The bar to the use of the NOLs for 1972 did not disallow a deduction which should have been allowed, but was not allowed, in another year. The "determination," whether by the Commissioner or the district court, involved only one year—1972. It did not address any other year. Taxpayers were still able to carry the NOLS forward, and, in fact, they did so to the extent the law permitted.

819 F.2d at 68.

The issue was whether the disallowance of Petitioners' October 3, 1984, claim for refund had the effect of a double disallowance of a deduction. The quoted "analysis"

merely begs the question and one is left to grope for the basis of the court's holding.

The Petitioners made two arguments to the Fourth Circuit to support their contention that there had been a determination disallowing a deduction which should have been allowed to, but was not allowed to, the taxpayer for another taxable year. The Petitioners first argued that the disallowance of their claim for refund for 1972 had "the effect of" a double disallowance of a deduction as follows:

a. The disallowance of the 1972 refund had the effect of allowing $670,108 of 1974 NOL to expire unused after December 31, 1979, thus disallowing its deduction, which deduction should have been allowed, but was not allowed, for *another* taxable year, i.e. 1976. See Appendix F.

b. The disallowance of the 1972 refund had the effect of allowing an additional $238,912 of 1974 NOL to expire unused after December 31, 1979, thus disallowing its deduction, which deduction should have been allowed, but was not allowed, for *another* taxable year, i.e. 1978. See Appendix F.

c. The disallowance of the 1972 refund had the effect of allowing an additional $299,350 of 1974 NOL to expire unused after December 31, 1979, thus disallowing its deduction, which deduction should have been allowed, but was not allowed for *another* taxable year, i.e. 1972. See Appendix F.

d. The disallowance of the 1972 refund had the effect of allowing $3,400 of NOL arising in 1973 to expire unused after December 31, 1978, thus disallowing its deduction, which deduction should have been allowed, but was not allowed, for *another* taxable year, i.e. 1972. See Appendix F.

Petitioners' second argument was that if a determination of a double disallowance had not yet occurred, such a determination could ultimately be achieved through the following steps:

Step 1—Petitioners claim the expired NOL deductions in a currently open year in which they had sufficient income, 1984 for example, by filing a claim for refund based upon the NOL deductions.[2]

Step 2—The IRS denies the claimed refund because the NOL carryover period has expired.

Step 3—The Petitioners sue for the denied refund and lose. At this point, there unquestionably and literally would be an I.R.C. § 1312(4) disallowance of "a deduction .... which should have been allowed to, but was not allowed to, the taxpayer for another taxable year ...." Moreover, there would now be two years for which the deduction was directly denied, 1972 and 1984. The fact that the disallowance of the 1984 deduction was not because the NOL should have been taken in 1972, but because under I.R.C. § 172 NOLs arising in 1973 and 1974 cannot be deducted in 1984, is of no consequence under the Seventh Circuit's decision in *Olin-Mathieson.*

Step 4—The Petitioners then claim and sue for a refund yet again, now for the third time, claiming mitigation.

Steps 1, 2 and 3 above are unnecessary if one accepts the Seventh Circuit's holding in *Olin-Mathieson*, applied *in combination with* the statutory adjustment mechanism of I.R.C. § 1314. See discussion below at Part II.B. Step 4 is unnecessary if one accepts the Tenth Circuit's holding in *J.B.N. Telephone.* See discussion below at II.C. Nevertheless, regardless of whether *Olin-Mathieson* should be applied in combination with I.R.C. § 1314, and regard-

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[2] Petitioners' partnership sold the Mall in 1984 and Petitioners had $3,650,923 of taxable income after audit of the return. The return was filed August 14, 1985, giving Petitioners until August 13, 1988, to claim a refund. I.R.C. § 6511(a).

less of whether *J.B.N. Telephone* is correct, a determination could ultimately and inevitably be achieved by following the four outlined steps. Accordingly, Petitioners argued that it was appropriate to grant mitigation relief in the context of *this action.* Fourth Circuit Reply Brief For The Appellants at 2-3.

Although it is not possible from the Fourth Circuit's opinion to determine why these arguments were rejected, because both arguments were properly before the court it must be assumed that both were rejected. Moreover, there can only be two reasons for the Fourth Circuit's rejection of Petitioners' arguments:

1. The first argument could have been rejected because the disallowance of the 1972 refund claim was a determination with respect to only one year, 1972, and was based upon a determination that the statute of limitations had expired for 1972, not upon a determination that the NOL deductions should have been taken in another year.

2. The second argument could have been rejected because the Fourth Circuit believed the multiple refund claims and multiple refund suits were a procedural prerequisite for mitigation relief.

In rejecting the first argument for the reason described above, the Fourth Circuit's holding is in direct conflict with the Seventh Circuit's decision in *Olin-Mathieson Chemical Corp. v. United States,* 265 F.2d 293 (7th Cir. 1959). In rejecting the second argument for the reason described above, the Fourth Circuit's holding is in conflict with either *Olin-Mathieson,* the Tenth Circuit's holding in *J.B.N. Telephone Company, Inc. v. United States,* 638 F.2d 227 (10th Cir. 1981), or both *Olin-Mathieson* and *J.B.N. Telephone.* Because there can be no other basis for the Fourth Circuit's holding, its decision necessarily conflicts with one or the other of these cases or perhaps both.

B. The Fourth Circuit's Requirements Of A Causal Connection Between The Improper Deduction And The Proper Deduction Conflicts With The Seventh Circuit's Rejection Of Such A Requirement In *Olin-Mathieson*

The typical double disallowance of a deduction case is one in which the taxpayer claims a deduction in Year 1, but it is later determined that the Year 1 deduction is improper *because* it should have been claimed in Year 2. 2 J. Mertens, *Law of Federal Income Taxation* (Rev. 1982) § 14.08a. In these cases, the court's determination would necessarily consider both Year 1 and Year 2 and determine which was the proper year for deduction.

Is this causal connection required, however? Can mitigation be invoked if the disallowance in Year 1 is for some reason other than that the proper year for deduction was Year 2, if the disallowance nevertheless *has the effect* of disallowing the deduction in Year 2? Must the court actually discuss the propriety of the Year 2 deduction as the basis for disallowing the Year 1 deduction?

The Seventh Circuit in *Olin-Mathieson Chemical Corp. v. United States*, 265 F.2d 293 (7th Cir. 1959), rejected such a causal connection as a precondition for finding a "double disallowance of a deduction." In *Olin-Mathieson*, the corporate taxpayer claimed an ordinary loss deduction in 1944. The government disallowed the deduction; the taxpayer paid the additional tax and sued for a refund. The district court found for the government, holding that the claimed loss was not deductible *because* it was a capital loss not an ordinary loss. *Olin Industries, Inc. v. Dallman*, 56-1 U.S.T.C. (CCH) ¶ 9188 (S.D. Ill. 1956). The taxpayer did not have any capital gain in 1944 against which to claim the loss. Thus, a capital loss carryover arose. The refund litigation for 1944 was concluded in 1956, when both the taxpayer and the government dismissed their appeal of the district court's decision. *See Olin-Mathieson Chemical Corp. v. United States*, 265 F.2d 293, 295 (7th Cir. 1959).

Subsequently, Olin brought another refund suit claiming a refund for 1945, on the basis that it was entitled to carryover the 1944 capital loss to 1945 and deduct it against 1945 capital gains. *Olin-Mathieson Chemical Corp. v. United States*, 58-2 U.S.T.C. (CCH) ¶ 9740 (S.D. Ill. 1958), *aff'd*, 265 F.2d 293 (7th Cir. 1959). By this time, however, the period within which the carryover deduction could be claimed had long expired as had the statute of limitations for each year within the carryover period. Olin argued, however, that the disallowance in the 1956 district court action of its 1944 ordinary loss deduction was a determination that "had the effect of" a double disallowance of a deduction. Note that the determination in the initial action that the 1944 loss should be disallowed *in no way involved 1945, but was made on the entirely independent basis that it was a capital loss. Olin Industries, Inc. v. Dallman*, 56-1 U.S. T.C. (CCH) ¶ 9188 (S.D. Ill. 1956). The government argued that there was no disallowance of a capital loss deduction. 265 F.2d at 296. The government, of course, was literally correct; an ordinary loss for 1944 was disallowed because it was a capital loss, the capital loss thus created was not disallowed. Moreover, the determination involved only one year, 1944. The government argued "that the bar of the statute of limitations operating against the carry-over of the claim of capital loss to 1945 is a circumstance which did not directly result from the initial determination allowing the long term capital loss for 1944." 265 F.2d at 296. The Seventh Circuit rejected the idea that a causal connection must exist between the improper and proper deductions in favor of a "but for" analysis:

> It is clear to us, however, that taxpayer would be entitled to the loss carry-over except for the bar of the statute of limitations, and that there was, therefore, a double disallowance of a deduction as provided in § 1312(4).

296 F.2d at 296.

In *Olin-Mathieson*, the determination that the 1944 loss was capital and not ordinary had the effect of creating a capital loss carryover that had expired by the time of the determination. The determination itself had nothing to do with the proper year of deduction. Nevertheless, the Seventh Circuit found the determination to have the *effect of* a double disallowance of a deduction, and thus allowed the deduction in 1945.

In Petitioners' case, the determination that the NOL deductions were not allowed for 1972 due to the expiration of the applicable limitations period is analogous to the determination in *Olin-Mathieson* that Olin's 1944 loss was not deductible because it was a capital loss. In each case, the determination creates a carryover deduction, which deduction is ipso facto disallowed because by the time of the determination the carryover period had expired and the statute of limitation periods had expired on the years within the carryover period. In *Olin-Mathieson* the Seventh Circuit allowed mitigation to apply to enable the deduction to be claimed in the proper year, 1945, because the deduction was claimed in writing on the 1944 return and thus made prior to the expiration of the statute of limitations for 1945. In this case, unless *Olin-Mathieson* is wrong, the same analysis must apply. In other words, disallowance of Petitioners' 1972 refund claim creates $1,275,650 of 1974 NOL that would otherwise expire unused. Under the *Olin-Mathieson* analysis, mitigation should apply to allow $670,108 of the 1974 NOL to be used in the *proper year* of deduction, 1976. This would in turn free $670,108 of 1973 NOL that could be used, in accordance with the adjustment procedure of I.R.C. § 1314, as an NOL deduction in 1972, which is the proper year for that deduction. The government has placed great emphasis on the fact that in *Olin-Mathieson* the deduction was initially disallowed for 1944 and ultimately allowed for 1945, while in this case the deduction has been disallowed for 1972 and would ultimately be allowed also for 1972 through mitigation. The fact that

mitigation as applied actually results in the disallowance of the deduction for the same year that the determination disallows it is irrelevant. In this case, the determination disallowing the carrybacks into 1972 has the effect of disallowing the use of the 1974 NOL in its proper years of 1976 and 1978. By allowing the proper deduction in those years, the 1973 NOL is freed up for use in its proper year of 1972. This last step is as a result of the prescribed adjustment mechanism of I.R.C. § 1314. It is this adjustment mechanism, not any alleged failure to achieve a determination of a double disallowance of a deduction, that causes Petitioners' disallowance and mitigation relief to be in the same year.

Mitigation relief in this case results from nothing more than a rote application of the Seventh Circuit's holding in *Olin-Mathieson* rejecting a causal connection requirement, in combination with the statutorily prescribed adjustment mechanism of I.R.C. § 1314. In holding that this analysis is not proper, the Fourth Circuit must necessarily have rejected the Seventh Circuit's holding in *Olin-Mathieson*. Such a rejection is curious indeed, given that the government has even embraced the *Olin-Mathieson* decision. Rev. Rul. 68-152, 1968-1 C.B. 369.[3]

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[3] Several "red herrings" deserve elimination. First, Petitioners are not attempting to deduct the same NOLs twice; the NOLs they seek to deduct would otherwise expire unused. Second, the fact that Petitioners would not be in this predicament if they had filed protective claims for refund or had amended their Tax Court petition to plead the carrybacks is irrelevant. Mitigation is applicable only in situations in which the statute of limitations expired due to failure to take proper action. Third, Petitioners' interpretation of the double disallowance of a deduction circumstance of adjustment would not result in keeping the statute of limitations open indefinitely for taxpayers who have valid deductions but who simply fail to claim them. Mitigation in the case of a double disallowance is proper only if the taxpayer maintained in writing his entitlement to the deductions prior to the expiration of the applicable bar. I.R.C. § 1311(b)(2)(B). Petitioners

C. The Fourth Circuit's Holding That Mitigation Relief Cannot Be Granted In The Same Action That Constitutes The Determination Conflicts With The Seventh Circuit's Decision in *J.B.N. Telephone*

The second and only other potential basis for the Fourth Circuit's decision could be that mitigation relief cannot be granted in the same action that creates the determination. Recall that in *Olin-Mathieson* the taxpayer lost its 1944 refund suit in 1956, thus achieving the determination and brought a *second* refund suit resulting in its mitigation relief. The Tenth Circuit in *J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227 (10th Cir. 1981), held that the proper procedure in a case which constitutes both the determination that a deduction is disallowed and a request for mitigation is not to dismiss the action, as was done in Petitioners' case, but to hold that action in abeyance to enable the taxpayers to claim a refund based on mitigation and if the refund is disallowed to have further proceedings in the *same action* without requiring another refund suit.

As outlined in part II.A. above, Petitioners can ultimately achieve a determination that disallows a deduction that should have been allowed but was not allowed for another taxable year, without relying on the application of the *Olin-Mathieson* decision in combination with the I.R.C. § 1314 adjustment mechanism, by engaging in a series of utterly inconsequential procedures. To the extent that the Fourth Circuit's holding was based upon a requirement that those procedures be followed, it is in conflict with the Tenth Circuit's opinion in *J.B.N. Telephone.*

In *J.B.N. Telephone*, the taxpayer claimed a loss deduction in 1972 for equipment it scrapped in 1971. The

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contend they satisfied this requirement by filing the IRS Form 1045 on December 13, 1979. The courts below never reached this issue because of their failure to apply *Olin-Mathieson* and/or *J.B.N. Telephone.*

IRS disallowed the deduction and the taxpayer paid the tax and brought a refund suit. The taxpayer argued in the alternative that it was entitled to the deduction as claimed in 1972 or, if not, it was entitled to a deduction in 1971 through mitigation (since the 1971 limitations period had expired). The court found that the deduction was properly allowable in 1971 and for that reason disallowed the 1972 deduction. (Thus, this case is an example of a case in which there is a causal connection between the improper and proper deduction.) This decision, disallowing the 1972 deduction, itself constituted the determination. The next question before the court was whether the court could also rule on the mitigation claim in the same action. In this regard, the Tenth Circuit referred to and *expressly refused to follow* the Second Circuit's holding in *Benenson v. United States*, 385 F.2d 26 (2d Cir. 1967).

Benenson involved a so-called "Livingstone transaction" in which a taxpayer would borrow money to purchase a treasury note at a discount from face value, which note was to mature the following year. The taxpayer would prepay the interest and claim a deduction in the first year, and receive the proceeds of the treasury note at maturity in the next year reporting a capital gain. In *Benenson* the taxpayers deducted $67,550 of interest in 1955 and reported a $60,000 capital gain in 1956; a $7,550 out-of-pocket loss but for tax consequences.

The IRS disallowed the 1955 interest deduction on April 7, 1959. The taxpayers paid the deficiency in 1959. On May 16, 1961, the taxpayers claimed a refund for 1955 and, in the alternative, claimed a refund for 1956. The administrative claim for 1955 was denied by the IRS on the basis that the transaction was a sham. The administrative claim for 1956 was disallowed because the 1956 statute of limitations had expired by the time the claim was made on May 16, 1961.

On May 5, 1964, the taxpayers brought a refund suit in district court claiming, in the alternative, a deduction

in 1955 or a deduction in 1956. *Benenson v. United States*, 257 F.Supp. 101 (S.D.N.Y. 1966), *aff'd*, 385 F.2d 26 (7th Cir. 1967). The claim for 1956 was itself in the alternative, in that the taxpayers claimed that the statute of limitations had not expired on their claim because they had made an "informal" claim for refund, *see* 257 F.Supp. 101, 108, or if the statute had expired, mitigation applied to enable them to receive their refund. The taxpayers also claimed their 1956 refund on the basis of equitable recoupment. The 1956 claim was the legal equivalent to Petitioners' claim for their NOL deduction in 1972 in that Petitioners claimed in the same action, in the alternative, that the statute of limitations for 1972 had not expired and, if it had, mitigation should apply.

The district court in *Benenson* found for the government and denied the 1955 interest deduction as a sham. The district court also found for the government on the 1956 claim, holding that the statute of limitations had expired and that mitigation was premature.

The taxpayers appealed to the Second Circuit, but dropped their claim for a 1955 refund and their statute of limitations argument for 1956, thus apparently attempting to overcome their lack of a determination. 385 F.2d 26, 30 n.7. Thus, the situation before the Second Circuit in *Benenson* was different from the situation before the Fourth Circuit in this case only in that the taxpayer in *Benenson* dropped his alternative ground that the statute of limitations had not expired and relied solely upon mitigation. The Second Circuit in *Benenson*, like that Fourth Circuit in the case below, assumed that a determination had occurred, but denied mitigation. Unlike the Fourth Circuit, the Second Circuit analyzed the reasons for its holding. Specifically, it held that the taxpayers were not entitled to mitigation because they were required to file a separate claim for refund for 1956 based upon mitigation and bring a second refund suit. 385 F.2d at 31. (This holding is hereinafter referred to as the "*Benenson* rule.") It is on this point

that the Tenth Circuit is *expressly* in conflict with the Second Circuit. As announced in *J.B.N. Telephone*, the Tenth Circuit would hold the existing action in abeyance to enable the taxpayer to file a refund claim and have it disallowed, rather than foster multiple lawsuits.

An understanding of the lengths to which the government has gone in Petitioners' case purposely to prevent Petitioners from achieving a literal determination directly disallowing "a deduction which should have been allowed but was not allowed to the Petitioners for another taxable year" merits discussion in order to illuminate the wisdom of the Tenth Circuit's practical approach to the issue. As illustrated on the chart at Appendix F, the Petitioners originally carried forward $238,912 of 1973 NOL to 1978 and $670,108 of 1973 NOL to 1976. These carryforwards, as a matter of law, became erroneous when the 1972 court case was settled and when it was determined in this action that the statute of limitations had expired on Petitioners' carryback, because I.R.C. § 172 *requires* that NOLs be carried back to offset income in earlier years *before* being carried forward. Thus, Petitioners' former counsel asked the IRS to acknowledge that the NOL deductions claimed in these years were erroneous and should be disallowed because they should have been carried to 1972. See Stipulations ¶ 17, Fourth Circuit Joint Appendix at 24. Moreover, in the trial of this case, Petitioners asked the district court judge to issue a writ of mandamus ordering the government to enter into an I.R.C. § 1313(a)(4) agreement to acknowledge that the NOLs were deducted improperly and should be disallowed, which request was not addressed in the district court's opinion. The government's persistent refusal to acknowledge that as a matter of law the deductions of the 1973 and 1974 NOLs were erroneous is the only reason why a determination giving rise to a direct double disallowance may not have yet occurred in this case. Having taken this course purposefully to obstruct the workings of the mitigation pro-

visions so as to protect its windfall, the government should not be permitted to hide behind the literal and technical view of mitigation procedure prescribed by the Second Circuit in *Benenson* and now embraced by the Fourth Circuit. *See Jones v. Commissioner*, 79 T.C. 668 (1982) (discussed in Part III. below). Rather the practical approach of the Tenth Circuit in *J.B.N. Telephone* is appropriate to deal with such recalcitrant governmental behavior.

D. Summary Of The Conflicts

By failing to articulate any reason for its holding, the Fourth Circuit has also failed to acknowledge expressly that its decision was in conflict with *Olin-Mathieson* and *J.B.N. Telephone*. Nevertheless, the conflicts between the Fourth Circuit's decision in this case, the Seventh Circuit's decision in *Olin-Mathieson* and the Tenth Circuit's decision in *J.B.N. Telephone* are real and direct, not theoretical or "in principle." The conflicts are, however, interrelated.

If the Fourth Circuit's position is that *Olin-Mathieson* is wrong and thus a double disallowance cannot exist unless the reason for the disallowance of the improper deduction is because it should have been allowed in another proper year, then the Tenth Circuit's decision in *J.B.N. Telephone* is arguably irrelevant to the outcome of this action because Petitioners can never obtain a determination disallowing the deductions for some other year *because* they should have been allowed in 1972.[4] In such case, the Fourth Circuit's decision would be in conflict with *Olin-Mathieson*, but arguably not with *J.B.N. Telephone*. On the other hand, if the Fourth Circuit's position is that *J.B.N. Telephone* is wrong and Petitioners must bring multiple refund claims and suits after the

[4] If the government is required to enter into an I.R.C. § 1313 (a)(4) agreement acknowledging that the 1978 and 1979 carryovers were erroneous, then such a determination can be had.

conclusion of this action, *Olin-Mathieson* is irrelevant to *this* action because the mitigation claim is premature. In such a case, the Fourth Circuit's decision would be in conflict with *J.B.N. Telephone*, but not necessarily with *Olin-Mathieson*. In any event, however, the decision below is in real and direct conflict with *Olin-Mathieson* or *J.B.N. Telephone*, or both. The lack of an express recognition of this situation by the Fourth Circuit should not deter this Court's recognition of the conflict and the need for the conflict to be resolved. A court of appeals panel should not be able to insulate its decision from this Court's scrutiny by failing to articulate the reasons for the decision.

The most plausible interpretation of the Fourth Circuit opinion is that it conflicts with *J.B.N. Telephone* rather than *Olin-Mathieson*. As mentioned above, the government follows the *Olin-Mathieson* decision. Moreover, the Fourth Circuit even cited the case in the opinion below, albeit merely as support for its tautological observation that statutes of limitations "may of necessity bar taxpayers from claiming refunds. . . ." 819 F.2d 65, 68. Thus, if the Fourth Circuit intended to digress from *Olin-Mathieson* to require a causal connection, perhaps it would have said so. Therefore, it is the conflict with *J.B.N. Telephone* that unequivocally remains. As discussed in Part III below, the issue involved in that conflict is important in that it raises significant and recurring problems.

III. WHETHER A COURT HAS THE POWER IN ONE ACTION BOTH TO CREATE THE REQUISITE DETERMINATION AND GRANT MITIGATION RELIEF IS AN IMPORTANT QUESTION OF FEDERAL TAX LAW THAT RAISES SIGNIFICANT AND RECURRING PROBLEMS AND CONSEQUENTLY SHOULD BE SETTLED BY THIS COURT

If the only conflict between the Fourth Circuit's decision in this case and the decision of another court of appeals is in the issue of whether Petitioners' mitigation

claim is premature, why should the Court grant this petition rather than require Petitioners to file one, or even two more refund suits to obtain their relief? The reason that the Court should resolve the *Benenson* rule conflict is that the application of the *Benenson* rule has implications much broader than merely forcing these particular Petitioners to incur the considerable expense in bringing multiple refund suits. The *Benenson* rule has spawned so many examples of multiple lawsuits involving the same parties and the same facts that it is perhaps (tax "protester" cases aside) the closest thing the tax law has to the habeas corpus petition. Moreover, application of the *Benenson* rule tends to frustrate the ability of taxpayers to obtain the equitable and remedial relief of mitigation.

Consider the latest example. In *Republic Petroleum Corp. v. United States*, 397 F. Supp. 900 (E.D.La. 1975), *aff'd in part and rev'd in part*, 613 F.2d 518 (5th Cir. 1980), the taxpayer brought a refund suit claiming, *inter alia*, that it was entitled to recognize income on the installment method over the years 1959 to 1966 with respect to a mineral lease sold in 1959, and claiming, in the alternative, that if installment treatment was not allowed, with the result that all the gain was properly recognized in 1959, the taxpayer was entitled to mitigation relief for having included the same gain in income both in 1959 and in the later years. The district court held that the full amount of the gain was properly recognized in 1959, and that the taxpayer's mitigation claim for the later years was premature. The Fifth Circuit affirmed the district court on these two issues, expressly invoking the *Benenson* rule to support its conclusion that the mitigation claim could not be heard in the same action in which the determination was created. 613 F.2d 518, 527. The Fifth Circuit also noted that "[o]f course, we express no view as to whether taxpayer ought to prevail in a future mitigation action." *Id.* n.21.

The taxpayer then brought a second refund suit based solely on mitigation. The district court in an unreported

decision denied mitigation relief, but the Fifth Circuit reversed allowing the taxpayer mitigation relief. *Cocchiara v. United States*, 779 F.2d 1108 (5th Cir. 1986), *rev'g unreported district court decision.* There was no apparent purpose in requiring the second lawsuit. With all of the facts, parties and issues before them, the district court and the Fifth Circuit should have addressed the issues in the first action.

The government has also been the victim of the *Benenson* rule. In *B.C. Cook & Sons, Inc. v. Commissioner*, 59 T.C. 516 (1972), the corporate taxpayer claimed an embezzlement loss for its year ended September 30, 1965. The embezzlement had been concealed by overstatements of purchases, thus overstatements of cost of goods sold, in previous years. The government objected to the deduction of the embezzlement loss in the year it was discovered observing that to allow the 1965 embezzlement loss would allow the taxpayer to deduct the same amount twice.

In response to the government's contention, the taxpayer in its reply brief asserted that because the statute of limitations for the earlier years had expired the government's only remedy was mitigation and mitigation could not be obtained in the action because that action itself would constitute the determination. The taxpayer prevailed, and the government issued a second statutory notice of deficiency thus forcing the taxpayer to commence another Tax Court action, this time the only issue being mitigation. *B.C. Cook & Sons, Inc. v. Commissioner*, 65 T.C. 422 (1975), *aff'd*, 584 F.2d 53 (5th Cir. 1978). While the government's mitigation action was ultimately unsuccessful, there was no reason that two lawsuits were necessary to come to this result.

Not only does the *Benenson* rule needlessly foster multiple litigation, it frustrates the very purpose of the mitigation provisions. The announced Congressional purpose of mitigation is to provide "an equitable solution of [sic]

certain classes of income-tax problems, now very numerous, which have caused much hardship to taxpayers and great difficulty to the Commissioner, the Board of Tax Appeals, and the courts." S. Rep. No. 1567, 75th Cong. 3d Sess., *reprinted at* 1939-1 C.B. (Part 2) 779, 814. The announced Congressional purpose for the determination requirement was to give "authoritative sanction" to the position of the parties. *Id.* at 815. There is no reason why mitigation relief should not be granted in the same action that gives this "authoritative sanction" to the parties' positions. Yet, by applying the *Benenson* rule the courts have raised an unnecessary, unintended entry barrier to the intended equitable and remedial relief. It cannot be known how many taxpayers simply give up rather than endure the expense of multiple lawsuits. The government, on the other hand, need only mail another statutory notice of deficiency, thus putting the burden on the taxpayer to bring the lawsuit. Therefore, the government can be expected to be content with the *Benenson* rule.

In any event, the government would be unlikely to seek certiorari on the *Benenson* rule issue, knowing that ultimately the taxpayers will obtain mitigation relief. *Thus, the only opportunity the Court will ever have to resolve what is an express split in the circuits on the issue is to grant a taxpayer petition.* As illustrated in this Part III, the issue is not one of trivial or academic interest.

The situation has digressed to one of gamesmanship, with the contestants brazenly demanding a literal interpretation of the mitigation prerequisites in order to protect their patently undeserved windfalls. Consider *Jones v. Commissioner*, 79 T.C. 668 (1982), a clear example of a taxpayer trying to do to the government what the government seeks to do to Petitioners in this case—that is, frustrate the operation of the mitigation provisions in order to preserve a windfall. The

taxpayer in *Jones* received deficiency notices for 1971 and 1973 claiming approximately $5,000 and $107,300 of additional tax was due in those years, respectively. The taxpayer had a $600,000 NOL in 1974 that he originally carried forward and deducted in 1975. The taxpayer brought a Tax Court action in late 1977 to contest the 1971 and 1973 deficiencies. Subsequently, he amended his Tax Court petition and filed protective claims for refund carrying back the 1974 NOL to 1971 and 1973, thus attempting to deduct the same NOL twice. At the time the amended petition and protective claims were filed, one year remaind on the 1975 statute of limitations. The government failed to take action before it expired, however. In the Tax Court action, the taxpayer sought to have the Tax Court grant summary judgment for him finding no deficiency in the hope that this would preclude the government from ever achieving a "determination" of the obvious—to wit, that there had been a double allowance of a deduction. The government objected to the summary judgment on this basis and prevailed. The Tax Court, however, adhering to the *Benenson* rule, refused to rule on the government's entitlement to mitigation despite the fact that the issue was "extensively" briefed and argued. 79 T.C. 668, 674-75.

Without this Court's intervention to determine whether the *Benenson* rule should prevail or whether the practical approach of *J.B.N. Telephone* is more appropriate, the lower courts will continue to struggle over whether mitigation relief is available only to those willing to pay the enormous price of multiple lawsuits. Moreover, the contestants will be tempted, like the taxpayer in *Jones* and the government in this case, to insist upon a literal and technical application of the mitigation elements in an effort to retain their unjustified windfalls in clear derrogation of the Congressional purpose of mitigation.

This case, representing as it does a clear application of the *Benenson* rule and thus a direct conflict with the

Tenth Circuit's rejection of the rule in *J.B.N. Telephone*, is the proper vehicle for this court to make its first badly needed pronouncement in the area of mitigation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-2579

SAMUEL M. LONGIOTTI; BETTY C. LONGIOTTI,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham
Richard C. Erwin, District Judge—(CA-85-120)

Argued: January 5, 1987 Decided: May 19, 1987

Before WIDENER and WILKINSON, Circuit Judges, and SENTELLE, United States District Judge for the Western District of North Carolina, sitting by designation.

H. Bryan Ives, III (Parker, Poe, Thompson, Bernstein, Gage & Preston on brief) for appellants; David English Carmack, Department of Justice (Roger M. Olsen, Assistant Attorney General; Michael L. Paup; Kenneth L. Greene, Department of Justice; Kenneth W. McAllister, United States Attorney on brief) for appellee.

WILKINSON, Circuit Judge:

Appellants Samuel M. and Betty C. Longiotti claim a refund of federal income taxes based on certain net operating loss carrybacks. The district court granted the government's motion for summary judgment on the ground that the claim was barred by the thirty-nine and a half month statute of limitations set out in section 6511(d)(2)(A) of the Internal Revenue Code. We affirm.

I.

Taxpayers suffered net operating losses (NOLs) in 1973 and 1974. They deducted these losses as carryovers in 1976, 1978 and 1979. In 1975, the IRS issued a notice of deficiency for $324,423.57 on taxpayers' 1972 federal income taxes. In 1976, taxpayers filed suit in the Tax Court to contest this ruling. During the lawsuit, taxpayers never contended that their 1973 and 1974 NOLs should be carried back to reduce their 1972 deficiency.

In October, 1979, the parties settled the case by computing the 1972 deficiency as $187,120.22. The Tax Court entered judgment in that amount on January 3, 1980, and Samuel Longiotti paid the 1972 deficiency on November 30, 1982. On October 3, 1984, taxpayers filed a claim for refund, alleging that the 1973 and 1974 NOLs should have been carried back to 1972. The Commissioner denied the refund claim, and taxpayers filed a suit for the refund in federal district court.

The district court granted summary judgment for the government, holding that the statute of limitations had run on the refund claim and that taxpayers were not eligible for mitigation.

II.

The government argues that under section 6511(d)(2)(A) of the Code, taxpayers had to bring their refund suit in district court within thirty-nine and a half months following the end of the taxable year of the net

operating loss. Taxpayers, on the other hand, contend that that section must be read to permit a refund claim to be filed within two years of the date the deficiency was paid. We believe the plain language of the statute supports the government's view.

Normally, the statute of limitations for filing a tax refund claim is "three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later." 26 U.S.C. § 6511(a). Since the existence of net operating losses might not become known until after the § 6511(a) period had expired, Congress enacted a special limitations provision to govern such losses. *Mar Monte Corp. v. United States*, 503 F.2d 254, 256 (9th Cir. 1974). If the refund is attributable to net operating loss carrybacks, "in lieu of the 3-year period of limitation prescribed in subsection (a), the [limitations] period shall be that period which ends with the expiration of the 15th day of the 40th month" following the end of the taxable year of the net operating loss which results in the carryback. 26 U.S.C. § 6511(d)(2)(A). Under section 6511(d)(2)(A), the thirty-nine and a half month period substitutes for the normal three years from filed period set out in section 6511(a), but the two-years-from-payment period in section 6511(a) is not affected. The limitations period for refunds based on NOL carrybacks is thus ordinarily either thirty-nine and a half months from the end of the NOL year or two years from when the tax is paid. *Nelson v. United States*, 757 F.2d 1537 (5th Cir. 1985); Rev. Rul. Rul 65-281, 1965-2 C.B. 44.

In this case, however, a further statutory provision applies. Under section 6511(d)(2)(B)(i), if the allowance of a credit or refund attributable to an NOL carryback "is otherwise prevented by the operation of any law or rule of law . . . , such credit or refund may be allowed or made if a claim therefor is filed within the period provided in subsection A of this paragraph." Taxpayer concedes that the Tax Court judgment with regard to

the deficiency operates as "a law or rule of law" under section 6512(a) for purposes of section 6511(d)(2)(B)(i). Under 6511(d)(2)(B)(i), therefore, taxpayers may bring the refund suit if they are within the limitations period set out in section 6511(d)(2)(A). The question is whether the reference in 6511(d)(2)(B)(i) to 6511(d)(2)(A) restricts taxpayers to the thirty-nine and a half months limitations period.

Taxpayers claim that subsection A explicitly provides for the thirty-nine and a half month period and implicitly provides for the two-years-from-payment period. They contend that Congress enacted section 6511(d)(2)(B) to allow taxpayers to take advantage of NOL carrybacks normally barred by res judicata or by some other rule of law. According to taxpayers, there is nothing to suggest that section 6511(d)(2)(B) was intended to make the statute of limitations more restrictive by eliminating the two-years-from-payment period when taxpayers file a petition for redetermination.

The plain language of the relevant provisions, however, contradicts taxpayers' position. Section 6511(d)(2)(B)(i) refers to "the period" in 6511(d)(2)(A). The single period provided in section 6511(d)(2)(A) is thirty-nine and a half months. There is no reference to a two-years-from-payment period in that section, and we decline the invitation to imply what Congress has not enacted. The fact that the two-years-from-payment period might apply in the absence of a prior Tax Court decision is another matter altogether. Here there was a prior decision, and Congress enacted a provision to address precisely these circumstances.

The same conclusion was reached in *Mar Monte Corp. v. United States*, 503 F.2d 254 (9th Cir. 1974). In *Mar Monte*, the taxpayer corporation filed a petition for redetermination in the Tax Court for tax year 1959. The parties reached a settlement on the deficiency, and the taxpayer paid it in 1966. Later the same year, the taxpayer filed in district court a refund claim in which it

attempted to carry back to 1959 its NOLs for 1960, 1961 and 1962. The Ninth Circuit held the suit was barred by the thirty-nine and a half month statute of limitations set out in subsection A. Relying on the plain meaning of subsection A and on the legislative history, that court rejected taxpayer's argument that the two-years-from-payment period was implicit in subsection A.

The reasoning of the *Mar Monte* court is instructive. The court noted that Congress enacted section 6511(d)(2)(B) to afford relief when NOLs arose *after* a Tax Court decision, and indeed the provision seeks to ensure that taxpayers will not be precluded by a prior decision from claiming NOLs before they even learn about them. Congress did not address the situation where, as here, the NOLs were realized *before* taxpayers filed their initial action. *Mar Monte*, 503 F.2d at 258.

In this case, taxpayers should have claimed their net operating loss carrybacks in the Tax Court—the very forum in which they brought suit to resolve their 1972 tax liability. Instead, they agreed to a settlement on their 1972 deficiency without raising the possibility of carrying back the NOLs to that year. *See Family Group, Inc. v. United States*, 416 F.Supp. 1170, 1172 (E.D.N.Y. 1976) (plaintiffs knew of net operating losses and could have sought appropriate offset by raising NOL carryback at Tax Court proceeding). Taxpayers candidly "concede they could have made their claim prior to the expiration of the statute of limitations; they wish they had." Their failure to do so does not permit this court to disregard the statutory limitations period that Congress enacted to govern claims of this character.

III.

Taxpayers argue that, if their refund suit is barred by the thirty-nine and a half month statute of limitations, they are entitled to mitigation under sections 1311-14 of the Internal Revenue Code, 26 U.S.C. § 1311-14. The mitigation provisions permit the correction of an error made in a prior tax year even though the ordinary limitations

period has run. *Chertkof v. Commissioner*, 649 F.2d 264, 267 (4th Cir. 1981); *O'Brien v. United States*, 766 F.2d 1038, 1041 (7th Cir. 1985). They do not, however, constitute general equitable exceptions to statutory limitations periods, and the party seeking to invoke them bears the burden of demonstrating that their requirements have been satisfied. *O'Brien v. United States*, 766 F.2d at 1042. Here taxpayers have failed to carry that burden.

Mitigation is permitted when three elements are present: 1) there must be "a determination" of tax liability as defined in 26 U.S.C. § 1313(a)(1)-(4); 2) the determination must fall within one of the circumstances of adjustment described in 26 U.S.C. § 1312(1)-(7); and 3) depending on which circumstance of adjustment is found, either an inconsistent position must be maintained by the party against whom mitigation will operate, 26 U.S.C. § 1311(b)(1), or the correction of the error must not have been barred at the time the party for whom mitigation will operate first maintained its position, 26 U.S.C. § 1311(b)(2). The government argues that none of the three mitigation elements is present. We need not rule so broadly, because we agree that taxpayers failed to establish a necessary circumstance of adjustment under 26 U.S.C. § 1312(4).

Section 1312(4) allows mitigation in the case of a double disallowance of a deduction or credit. This situation arises when a "determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year." 26 U.S.C. § 1312(4). Assuming, *arguendo*, that a "determination" has been made, taxpayers urge that the denial of their refund claim burdens them with a double disallowance. Taxpayers assert that, although the 1973 and 1974 NOLs were carried forward to 1976, 1978 and 1979, the NOLs were not exhausted.* They argue that

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* Taxpayers carried part of their $912,420 NOL in 1973 forward to 1976. Their taxable income in that year was $670,108, and they deducted that amount of the 1973 NOL. They carried the remaining $242,312 of the 1973 NOL forward to 1978. Their taxable

the effect of disallowing the NOLs' use in 1972 is to disallow the deduction of the unused portion of the 1973 NOL after 1978 and of the 1974 NOL after 1979.

This situation, however, does not constitute a double disallowance within the meaning of section 1312(4). The bar to the use of the NOLs for 1972 did not disallow a deduction which should have been allowed, but was not allowed, in another year. The "determination," whether by the Commissioner or the district court, involved only one year—1972. It did not address the use of the NOLs in any other year. Taxpayers were still able to carry the NOLs forward, and, in fact, they did so to the extent the law permitted.

Congress did not intend the mitigation provisions to provide relief in every situation where the expiration of a statute of limitations precludes a claim. "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947). Statutes of limitations "are an indispensable part of practical tax administration" which may of necessity bar taxpayers from claiming refunds and the government from collecting revenue. *Olin Mathieson Chemical Corp. v. United States*, 265 F.2d 293, 296 (7th Cir. 1959). At some point the interest of a party in pursuing a claim yields to the interest of the public in putting claims to rest.

The judgment of the district court is

AFFIRMED.

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income in that year, however, was only $238,912, leaving $3,400 of the 1973 NOL to expire unused. Taxpayers' NOL for 1974 was $2,157.435. They deducted $881,785 in 1979, leaving $1,275,640 to expire unused.

In their petition for redetermination, taxpayers sought to carry the 1973 and 1974 NOLs back to 1972. Their taxable income for 1972 was $1,211,770. They could have exhausted all $912,420 of the 1973 NOL and $299,350 of the 1974 NOL by carrying them back to 1972. Taxpayers then could have carried $909,010 of the remaining $976,290 forward to 1976, 1978 and 1979. The amount that would expire unused under taxpayers' formulation would be $67,280.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

C-85-120-D

SAMUEL M. LONGIOTTI and BETTY C. LONGIOTTI,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

[Filed June 5, 1986]

MEMORANDUM OPINION

ERWIN, District Judge

This matter is before the court on cross motions by the parties for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Both parties have fully briefed the issues before the court, and argument was heard on May 22, 1986 in Greensboro. The case is now ready for a ruling.

Facts

This is an income tax case concerning plaintiffs' return filed in the calendar year 1972. The parties have stipulated that in that year the plaintiffs reported a taxable loss of $266,132.23. In the year 1973-1975, the plaintiffs reported net operating losses (NOLs) of $912,420.00, $2,157,435.00, and $1,828,011.00. On November 17, 1975, the Internal Revenue Service (IRS) issued to plaintiffs a notice of deficiency claiming taxable income for the calendar year 1972 in the amount of $559,937.32. A petition to the United States Tax Court was properly filed on

the 1972 return on February 11, 1976. By December 13, 1979, the tax case had reached a settlement, based upon a computation of $329,709.73 in taxable income for 1972. Also on that date, the tax court transmitted to the IRS service center in Memphis, Tennessee a form 1045, which claimed a carry-back of all the 1973 net operating loss (NOL) and a portion of the 1974 NOL to offset the 1972 deficiency established in the settlement of the tax case. The decision of the tax court was formally entered on January 3, 1980, and that court lost jurisdiction over the 1972 tax case on April 2, 1980 pursuant to 26 U.S.C. §§ 7481(a)(1) and 7483.

On June 5, 1980, the plaintiffs filed an amended return for 1972. This was a claim for abatement, relying on an attempt to carry back to 1972 the 1973 and 1974 NOLs outlined in the Form 1045 previously submitted to the IRS. On October 6, 1980, the IRS notified the plaintiffs that their claim for abatement was denied. The IRS reasoned that the statute of limitations had run on the taxable years involved. On November 30, 1982, plaintiff Samuel M. Longiotti paid the 1972 deficiency according to the tax court ruling. On October 3, 1984, the plaintiffs filed a refund claim for the amounts paid on November 30, 1982, and, within a month, were informed by the IRS that their refund claim was denied. This refund suit followed and was docketed with this court on January 28, 1985.

Discussion

The court is called on to find, as a matter of law, whether the plaintiffs may utilize 1973 and 1974 NOL carry-backs in application to their recalculated 1972 taxable income. The Government argues that the statute of limitations has run, forever precluding such carry-backs to 1972. The plaintiffs contend that the statute of limitations does not apply.

Title 26 of the United States Code, Section 6511(a), provides that an administrative claim for refund may be

filed within three years after the return was filed or within two years after the tax was paid, whichever period expires later. In 26 U.S.C. § 6511(d)(2)(A), the code provides for a separate thirty-nine and one-half months' limitations period for NOL carry-back deductions. Further, the code provides in 26 U.S.C. § 6512 that a tax court determination of a taxable year will be final, and no claim for refund may be pursued for such year, except as to any amount "in excess of an amount computed in accordance with" the final tax court decision. 26 U.S.C. § 6512(a)(2). The court notes that there are three further exceptions, but none are applicable to the case *sub judice*. Plaintiffs rely on § 6512(a)(2) and, alternatively, on § 6511(d)(2)(B). The Government relies on § 6512 and alternatively, on a small body of case law.

Plaintiffs' argument under 26 U.S.C. § 6512(a)(2) is without merit. This court cannot reopen a decision of the tax court to award a refund based upon a deduction not before the tax court. This is precisely what § 6512 seeks to prohibit. Since the amount paid on the deficiency by Samuel M. Longiotti was the exact amount determined owed by the tax court, plaintiffs can in no wise assert that this payment was an amount "in excess of an amount computed in accordance with" the tax court ruling.

Of more difficulty, is plaintiffs' argument under 26 U.S.C. § 6511(d)(2)(B). Section 6511(d)(2)(B) states that notwithstanding any other bar (i.e. § 6512), refund of a tax attributable to a NOL carry-back is authorized, "if claim therefor is filed within the period provided in subparagraph (A) of this paragraph." Subparagraph (A) is, of course, 26 U.S.C. § 6511(d)(2)(A). Plaintiff suggests that subparagraph (A), which provides for the thirty-nine and one-half month period, should be interpreted as to attach consecutively to the two years from paid provision of § 6511(a). However, the court is of the opinion that *Mar Monte Corp. v. United States*, 503 F.2d

254 (9th Cir. 1974), and *Family Group, Inc. v. United States*, 416 F. Supp. 1170 (E.D.N.Y 1976), are on point and dispositive The Ninth Circuit has rejected plaintiffs' interpretation.

> In instances wherein a taxpayer seeks a refund based on net operating loss carrybacks and the losses are carried back to a taxable year which previously has been the subject of a final decision of the Tax Court, the controlling statutory provision is subparagraph (B). The limitation period encompassed by subparagraph (B) is that period *provided* by subparagraph (A). Clearly section 6511(d)(2)(A) provides only one limitation period.

Mar Monte, 503 F.2d at 257. Subparagraph (A) provides for only the thirty-nine and one-half month period. It does not incorporate the two years from paid provision of § 6511(a). In the Eastern District of New York, Judge Pratt reached the same conclusion as the Ninth Circuit on virtually identical facts. *Family Group*, 416 F. Supp. at 1172. This court can only conclude that the language of the statutes on their faces, and as interpreted by case precedent, acts to bar the plaintiffs from carrying back their NOLs to effecutate a refund on their 1972 taxable income.

Plaintiffs next argue that if the statute of limitations is held to be in effect, the mitigating provisions of the Internal Revenue Code, 26 U.S.C. §§ 1311-1314, should operate to provide equity in this situation by applying the adjustment mechanisms found in § 1314. The court cannot agree. The mitigation provisions serve to protect taxpayers, who, by application of the statute of limitations, would be burdened with a double taxation. *See United States v. Rachal*, 312 F.2d 376, 383 (5th Cir. 1962). Plaintiffs reported a taxable loss of $266,132.23 for the 1972 tax year. In 1979, the tax court determined that plaintiffs had $329,709.73 in taxable income for 1972. Plaintiffs paid the deficiency, but are barred from carry-

ing back their subsequent NOLs. This is, in actuality, one tax, a tax finally paid over a decade after it was due. While the bar of the statute of limitations is harsh, the court cannot conclude that the inability to carry back the NOLs operates as a double tax to engage the mitigation provisions.

The court is not without sympathy for the plaintiffs. The Internal Revenue Code is an amazingly intricate body of law. Failure to appreciate its very subtle nuances can work a hardship on even the most well informed taxpayer.

> True, one effect of the statutory scheme is to demand special foresight and vigilance of a taxpayer who chooses the Tax Court as a forum, lest by inadvertence he lose the rights granted to him elsewhere in the Code. While the Court agrees with plaintiff that the end result here seems harsh, it is not uncommon under a statute as complex and confusing as the Internal Revenue Code that opportunities for tax saving are frequently lost and penalties are frequently incurred, simply because of the understandable inability of a taxpayer and his professional advisors to fully comprehend the significance of all the detailed provisions of the Code. This, however, affords no legal basis to uphold plaintiff's position here.

Family Group Inc. v. United States, 416 F. Supp. 1170, 1172-73 (E.D.N.Y. 1976). Accordingly, the court must deny the plaintiffs' motion for partial summary judgment, and, there being no genuine issues of material fact, the court must grant the Government's motion for summary judgment. Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the plaintiffs' motion for partial summary judgment is DENIED, and the Government's motion for summary judgment is GRANTED pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. A judg-

ment dismissing this action with prejudice will be filed contemporaneously herewith.

/s/ Richard C. Erwin
United States District Judge

June 5, 1986

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

C-85-120-D

SAMUEL M. LONGIOTTI and BETTY C. LONGIOTTI,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

[Filed June 5, 1986]

JUDGMENT

For the reasons set forth in a Memorandum Opinion filed contemporaneously herewith, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiffs shall have and recover nothing from the defendant and that this action is dismissed with prejudice. IT IS FURTHER ORDERED that the costs of this action shall be taxed to the plaintiffs.

/s/ Richard C. Erwin
United States District Judge

June 5, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2579

SAMUEL M. LONGIOTTI, *et al.*,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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[Filed June 15, 1987]

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Widener and Judge Sentelle, United States District Judge sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

§ 1311. Correction of error

(a) General rule.—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) Conditions necessary for adjustment.—

(1) Maintenance of an inconsistent position.—Except in cases described in paragraphs (3)(B) and (4) of section 1312, an adjustment shall be made under this part only if—

(A) in case the amount of the adjustment would be credited or refunded in the same manner as an overpayment under section 1314, there is adopted in the determination a position maintained by the Secretary, or

(B) in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under section 1314, there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made,

and the position maintained by the Secretary in the case described in subparagraph (A) or maintained by the taxpayer in the case described in subparagraph (B) is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

(2) Correction not barred at time of erroneous action.—

(A) Determination described in section 1312 (3)(B).—In the case of a determination described in section 1312(3)(B) (relating to certain exclusions from income), adjustment shall be made under this part only if assessment of a deficiency for the taxable year in which the item is includible or against the related taxpayer was not barred, by any law or rule of law, at the time the Secretary first maintained, in a notice of deficiency sent pursuant to section 6212 or before the Tax Court, that the item described in section 1312(3)(B) should be included in the gross income of the taxpayer for the taxable year to which the determination relates.

(B) Determination described in section 1312 (4).—In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or before the Tax Court, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates.

(3) Existence of relationship.—In case the amount of the adjustment would be assessed and collected in the same manner as a deficiency (except for cases described in section 1312(3)(B)), the adjustment shall not be made with respect to a related taxpayer unless he stands in such relationship to the taxpayer at the time the latter first maintains the inconsistent position in a return, claim for refund,

or petition (or amended petition) to the Tax Court for the taxable year with respect to which the determination is made, or if such position is not so maintained, then at the time of the determination.

§ 1312. Circumstances of adjustment

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

(1) Double inclusion of an item of gross income.—The determination requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

(2) Double allowance of a deduction or credit.—The determination allows a deduction or credit which was erroneously allowed to the taxpayer for another taxable year or to a related taxpayer.

(3) Double exclusion of an item of gross income.—

(A) Items included in income.—The determination requires the exclusion from gross income of an item included in a return filed by the taxpayer or with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year, or from the gross income of a related taxpayer; or

(B) Items not included in income.—The determination requires the exclusion from gross income of an item not included in a return filed by the taxpayer and with respect to which the tax was not paid but which is includible in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

(4) Double disallowance of a deduction or credit. —The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

(5) Correlative deductions and inclusions for trusts or estates and legatees, beneficiaries, or heirs. —The determination allows or disallows any of the additional deductions allowable in computing the taxable income of estates or trusts, or requires or denies any of the inclusions in the computation of taxable income of beneficiaries, heirs, or legatees, specified in subparts A to E, inclusive (secs. 641 and following, relating to estates, trusts, and beneficiaries) of part I of subchapter J of this chapter, or corresponding provisions of prior internal revenue laws, and the correlative inclusion of deductions, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer.

(6) Correlative deductions and credits for certain related corporations.—The determination allows or disallows a deduction (including a credit) in computing the taxable income (or, as the case may be, net income, normal tax net income, or surtax net income) of a corporation, and a correlative deduction or credit has been erroneously allowed, omitted, or disallowed, as the case may be, in respect of a related taxpayer described in section 1313(c)(7).

(7) Basis of property after erroneous treatment of a prior transaction.—

(A) General rule.—The determination determines the basis of property, and in respect of any transaction on which such basis depends, or in respect of any transaction which was erroneously treated as affecting such basis, there

occurred, with respect to a taxpayer described in subparagraph (B) of this paragraph, any of the errors described in subparagraph (C) of this paragraph.

(B) Taxpayers with respect to whom the erroneous treatment occurred.—The taxpayer with respect to whom the erroneous treatment occurred must be—

(i) the taxpayer with respect to whom the determination is made,

(ii) a taxpayer who acquired title to the property in the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, or

(iii) a taxpayer who had title to the property at the time of the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, if the basis of the property in the hands of the taxpayer with respect to whom the determination is made is determined under section 1015(a) (relating to the basis of property acquired by gift).

(C) Prior erroneous treatment.—With respect to a taxpayer described in subparagraph (B) of this paragraph—

(i) there was an erroneous inclusion in, or omission from, gross income,

(ii) there was an erroneous recognition, or nonrecognition, of gain or loss, or

(iii) there was an erroneous deduction of an item properly chargeable to capital account or an erroneous charge to capital account of an item properly deductible.

§ 1313. Definitions

(a) Determination.—For purposes of this part, the term "determination" means—

(1) a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final;

(2) a closing agreement made under section 7121;

(3) a final disposition by the Secretary of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary—

(A) as to items with respect to which the claim was allowed, on the date of allowance of refund or credit or on the date of mailing notice of disallowance (by reason of offsetting items) of the claim for refund, and

(B) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Secretary in reduction of the refund or credit, on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time); or

(4) under regulations prescribed by the Secretary, an agreement for purposes of this part, signed by the Secretary and by any person, relating to the liability of such person (or the person for whom he acts) in respect of a tax under this subtitle for any taxable period.

(b) Taxpayer.—Notwithstanding section 7701(a)(14), the term "taxpayer" means any person subject to a tax under the applicable revenue law.

(c) Related taxpayer.—For purposes of this part, the term "related taxpayer" means a taxpayer who, with the

taxpayer with respect to whom a determination is made, stood, in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance, or disallowance was made, in one of the following relationships:

(1) husband and wife,

(2) grantor and fiduciary,

(3) grantor and beneficiary,

(4) fiduciary and beneficiary, legatee, or heir,

(5) decedent and decedent's estate,

(6) partner, or

(7) member of an affiliated group of corporations (as defined in section 1504).

§ 1314. Amount and method of adjustment

(a) Ascertainment of amount of adjustment.—In computing the amount of an adjustment under this part there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of the tax previously determined shall be the excess of—

(1) the sum of—

(A) the amount shown as the tax by the taxpayer on his return (determined as provided in section 6211(b)(1), (3), and (4), relating to the definition of deficiency), if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in section 6211(b)(2), made.

There shall then be ascertained the increase or decrease in tax previously determined which results solely from the correct treatment of the item which was the subject of the error (with due regard given to the effect of the item in the computation of gross income, taxable income, and other matters under this subtitle). A similar computation shall be made for any other taxable year affected, or treated as affected, by a net operating loss deduction (as defined in section 172) or by a capital loss carryback or carryover (as defined in section 1212), determined with reference to the taxable year with respect to which the error was made. The amount so ascertained (together with any amounts wrongfully collected as additions to the tax or interest, as a result of such error) for each taxable year shall be the amount of the adjustment for that taxable year.

(b) Method of adjustment.—The adjustment authorized in section 1311(a) shall be made by assessing and collecting, or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years. If, as a result of a determination described in section 1313(a)(4), an adjustment has been made by the assessment and collection of a deficiency or the refund or credit of an overpayment, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis of such alteration or revocation and any overpayment or deficiency resulting from such redetermination shall be refunded or credited, or assessed and collected, as the case may be, as an adjustment under

this part. In the case of an adjustment resulting from an increase or decrease in a net operating loss or net capital loss which is carried back to the year of adjustment, interest shall not be collected or paid for any period prior to the close of the taxable year in which the net operating loss or net capital loss arises.

(c) Adjustment unaffected by other items.—The amount to be assessed and collected in the same manner as a deficiency, or to be refunded or credited in the same manner as an overpayment, under this part, shall not be diminished by any credit or set-off based upon any item other than the one which was the subject of the adjustment. The amount of the adjustment under this part, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item other than the one which was the subject of the adjustment.

(d) Periods for which adjustments may be made.—No adjustment shall be made under this part in respect of any taxable year beginning prior to January 1, 1932.

(e) Taxes imposed by subtitle C.—This part shall not apply to any tax imposed by subtitle C (sec. 3101 and following relating to employment taxes).

APPENDIX F

The follwing two pages contain charts that summarize the Petitioners' utilization of net operating loss deductions during the years 1971 through 1979. The first chart shows the utilization prior to the 1972 Tax Court Case and the second chart shows the proper utilization after the 1972 Tax Court Case.

CHART SUMMARIZING THE PETITIONERS' UTILIZATION OF NET OPERATING LOSS DEDUCTIONS PRIOR TO 1972 TAX COURT CASE

	1971	1972	1973	1974	1975	1976	1977	1978	1979
Taxable Income Originally Reported	0	0	—	—	—	670,108	—	238,912	881,785
Net Operating Loss Originally Reported	0	0	912,420	2,157,435	1,828,011	—	614,472	—	—
Original Utilization of 1973 and 1974 Net Operating Loss Deductions Prior to Settlement of 1972 Tax Court Case			(670,108)			→ (670,108)			
			(238,912)				→ (238,912)		
				(881,785)					→ (881,785)
1973 and 1974 Net Operating Loss Deductions Expiring Unused Per Initial Utilization			3,400	1,275,650					

CHART SUMMARIZING PROPER UTILIZATION OF THE PETITIONERS' NET OPERATING LOSS DEDUCTIONS AFTER 1972 TAX COURT CASE

	1971	1972	1973	1974	1975	1976	1977	1978	1979
Taxable Income Per Settlement on 1-3-80 of 1972 Tax Court Case and as Originally Reported in Other Years	0	1,211,770	—	—	—	670,108	—	238,912	881,785
Net Operating Loss Originally Reported	0	0	912,420	2,157,435	1,828,011	—	614,472	—	—
Proper Utilization of Net Operating Loss Reflecting Tax Court Case		(912,420)	(912,420)						
		(299,350)		(299,350)					
				(670,108)		(670,108)			
				(238,912)			(238,912)		
				(881,785)					(881,785)
1973 and 1974 Net Operating Loss Deductions Expiring Unused Per Proper Utilization			0	67,280					

No. 87-425

Supreme Court, U.S.
FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL M. LONGIOTTI AND BETTY C. LONGIOTTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners did not qualify for mitigation relief from the statute of limitations because they had not suffered a "[d]ouble disallowance of a deduction" (26 U.S.C. 1312(4)).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL M. LONGIOTTI AND BETTY C. LONGIOTTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 819 F.2d 65. The opinion of the district court (Pet. App. 8a-13a) is reported at 635 F. Supp. 840.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1987. A petition for rehearing was denied on June 15, 1987 (Pet. App. 15a). The petition for a writ of certiorari was filed on September 14, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners reported net operating losses (NOLs) on their federal income tax returns for their 1972 through 1974 tax years. The losses incurred in 1973 and 1974 were carried forward to 1976, 1978, and 1979 to offset other income to the extent allowable under Section 172 of the In-

ternal Revenue Code.[1] In 1975, the Commissioner determined that petitioners had not suffered a loss, but instead had earned $559,937 in taxable income in 1972, and he asserted a deficiency of $324,424 for that year. Petitioners sought redetermination of the deficiency in the Tax Court. During the Tax Court proceedings, petitioners did not contend that the 1973 or 1974 NOLs should be carried back to reduce their 1972 taxable income. Ultimately, in October 1979, the parties reached a settlement of the Tax Court case. Pursuant to this settlement, the parties agreed that petitioners had $329,710 in taxable income during 1972 and that petitioners' deficiency was $187,120. The computation did not take into account the 1973 and 1974 NOLs. On December 13, 1979, petitioners' counsel transmitted to the Commissioner a signed stipulated decision reflecting the settlement, and the Tax Court formally entered the agreed decision on January 3, 1980. Pet. App. 2a, 8a-9a.

On December 13, 1979, petitioners' counsel also sent a Form 1045, Application for Tentative Refund, to the Internal Revenue Service Center in Memphis, Tennessee. That application for tentative refund claimed a carryback of all the 1973 NOL and a portion of the 1974 NOL to offset the 1972 deficiency established in the settlement of the tax case. The IRS denied the application for tentative refund on December 31, 1979, because it was not filed within 12 months of the close of the tax year from which the carryback resulted (C.A. App. 77). In June 1980, petitioners filed a claim for abatement in the form of an amended 1972 return based on carryback of the NOLs; the IRS also denied this claim. Pet. App. 9a; C.A. App. 22-24.

Petitioner Samuel Longiotti paid the 1972 deficiency on November 30, 1982. On October 3, 1984, petitioners filed

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.)

an administrative claim for refund of that payment alleging that the 1973 and 1974 NOLs should have been carried back to 1972. By letter dated November 6, 1984, the Commissioner denied petitioners' claim for refund because it was barred by the statute of limitations (I.R.C. § 6511). Pet. App. 9a.

2. Petitioners brought this suit in the United States District Court for the Middle District of North Carolina seeking a refund of their 1972 taxes. Petitioners argued that the application of their 1973 and 1974 NOLs to their 1972 tax year was not barred by the applicable statute of limitations.[2] Alternatively, petitioners argued that they were entitled to relief from the statute of limitations under the mitigation provisions, Sections 1311-1314 of the Code. These detailed provisions establish specific criteria for their application, and the statutory scheme permits relief only when three elements are present: (1) there must be a "determination" as defined in I.R.C. § 1313(a); (2) the determination must fall within one of the "[c]ircumstances of adjustment" described in I.R.C. § 1312; and (3) depending on the particular circumstance of adjustment, the conditions set forth in Section 1311 must be met—here, correction of the error must not have been barred at the time the taxpayer first maintained his position (I.R.C. § 1311(b)(2)(B)). The government maintained that none of these three requirements of the mitigation provisions was met.

The district court granted the government's motion for summary judgment (Pet. App. 8a-13a). The court stated that the mitigation provisions were designed "to protect taxpayers, who, by application of the statute of limita-

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[2] Both the district court (Pet. App. 9a-11a) and the court of appeals (*id.* at 2a-5a) held that the statute of limitations barred petitioners' attempt to carry back the NOLs to 1972; petitioners do not challenge these holdings in this Court (see Pet. i, 5).

tions, would be burdened with a double taxation" (*id.* at 11a). The court held that petitioners' inability to carry back the NOLs did not operate as a double tax (*id.* at 11a-12a).

3. The court of appeals affirmed (Pet. App. 1a-7a). With respect to the application of the mitigation provisions, the court assumed, without deciding, that the statutory requirement of a "determination" was met and that petitioners satisfied the limitations of Section 1311 (Pet. App. 6a). The court held, however, that there was no "circumstance of adjustment" here, as defined in Section 1312. Specifically, the court rejected petitioners' contention that the denial of their refund claim constituted a "[d]ouble disallowance of a deduction" under Section 1312(4) (Pet. App. 5a-7a). The court observed that the determination "did not disallow a deduction which should have been allowed, but was not allowed, in another year. The 'determination,' whether by the Commissioner or the district court, involved only one year—1972" (*id.* at 7a).

ARGUMENT

1. Petitioners' contention that they are entitled to statutory mitigation relief was correctly rejected by the court of appeals. The statutory language is plain; Section 1312(4) establishes as a "circumstance of adjustment" a "[d]ouble disallowance of a deduction," which is defined as a disallowance of a deduction "which should have been allowed to, but was not allowed to, the taxpayer for *another taxable year*" (emphasis added). No such circumstance of adjustment occurred here. Petitioners' attempt to take the NOLs in 1972 was denied because the statute of limitations had run on the 1972 return, but there has never been any plausible claim that these losses should have been allowed to another taxable year. Put another way, the year of the determination and the year of the proposed correction (under the mitigation statute) were the same—1972.

The mitigation statute is addressed to a different situation—namely, when the determination disallows a deduction that should have been allowed in another year; in that case, the mitigation statute affords the taxpayer the opportunity to take the deduction in the proper year despite the expiration of the statute of limitations. See, *e.g.*, *Chertkof* v. *Commissioner*, 649 F.2d 264, 267 (4th Cir. 1981); 2 J. Mertens, *Law of Federal Income Taxation* § 14.01 (rev. 1982 & Supp. 1987); Treas. Reg. § 1.1312-4(b) *Example 1*. Petitioners, by contrast, simply failed to claim the NOLs in 1972 in a timely fashion, even though they concededly had ample opportunity to do so before the statute of limitations expired (see Pet. App. 5a). The mitigation statute was not designed to ameliorate the consequences of such an oversight, and its language does not permit the relief that petitioners seek.

2. Petitoners make little effort to demonstrate that the text of the mitigation statute applies to their claim. Their contention that certiorari is appropriate here rests entirely on the assertion that the decision below conflicts with decisions of other courts of appeals (see Pet. 7-26). This assertion is mistaken.

a. Contrary to petitioners' contention (Pet. 9-15), the decision below is fully consistent with *Olin Mathieson Chemical Corp.* v. *United States*, 265 F.2d 293 (7th Cir. 1959). In that case, Olin claimed an ordinary loss deduction in 1944. The district court affirmed the Commissioner's disallowance of the loss on the ground that it was a capital loss that could be offset only against capital gains. Although it had no capital gains in 1944, Olin did have capital gains in 1945 against which the capital loss could be offset, except that claiming the loss in 1945 was barred by the statute of limitations. The court of appeals held that this situation satisfied the "[d]ouble disallowance of a deduction" requirement even though the loss was claimed as an ordinary loss in 1944 and as a capital loss in

1945.[3] Unlike the instant case, *Olin* involved two separate years—the year of the determination, 1944, and the year barred by the statute of limitations, 1945. Thus, the determination in 1944 satisfied the statutory requirement that the determination disallow a deduction that "should have been allowed to the taxpayer * * * for *another taxable year*" (I.R.C. § 1312(4) (emphasis added)). In this case, by contrast, petitioners seek to achieve through mitigation the precise relief that they were denied in the "determination", namely, the carryback of NOLs to 1972.

Petitioners' claim of a conflict rests on the premise that the Fourth Circuit below held that mitigation is available only when it is determined "that the Year 1 deduction is improper *because* it should have been claimed in Year 2" (see Pet. 12 (emphasis in original)). This premise is incorrect. The court below nowhere suggested that such a causal connection is a prerequisite to mitigation relief. Its opinion plainly shows that the court rejected petitioners' claim simply because it failed to satisfy the clear statutory directive that the "determination" must be made in connection with a different taxable year than the year for which the mitigation relief from the statute of limitations is sought (Pet. App. 6a-7a). Accordingly, the conflict asserted between *Olin* and the decision below does not exist.

b. Petitioners also suggest (Pet. 16-21) that the decision below may conflict with *J.B.N. Telephone Co.* v. *United States*, 638 F.2d 227 (10th Cir. 1981). But this contention rests on the assumption that the court of appeals ruled against petitioners for some reason other than the fact that the determination and the requested mitigation

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[3] The government had argued (see 265 F.2d at 296) that there was no double disallowance of the capital loss because the loss had been allowed as a capital loss in 1944; such a loss provided no deduction, however, because there was no capital gain in that year against which to offset it.

were for the same taxable year. Because the above defect plainly was the basis for the court of appeals' decision, petitioners' alternative claim of a conflict with *J.B.N. Telephone* falls by their own admission. See Pet. 7, 11.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] *J.B.N. Telephone* held that there was no requirement that a new court action be filed in order to obtain mitigation relief; rather, the Tenth Circuit held, mitigation relief could be granted in the same judicial proceeding in which the "determination" is made. The court below did not purport to rule on this point; it assumed that it was appropriate to address petitioners' mitigation claim in this proceeding, and it then proceeded to reject that claim on the merits because of the absence of a "circumstance of adjustment" as defined in I.R.C. § 1312. Thus, to the extent there is already a conflict in the circuits on the issue discussed by petitioners between *J.B.N. Telephone* and *Republic Petroleum Corp.* v. *United States*, 613 F.2d 518 (5th Cir. 1980), and *Benenson* v. *United States*, 385 F.2d 26 (2d Cir. 1976) (see Pet. 21-26), this case presents no occasion to address it.

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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent contends that Petitioners' claim for mitigation was properly rejected by the Fourth Circuit because the year of the determination and the year for which mitigation is sought are one and the same—1972 (Res. Br. 4). This contention is erroneous and misleading for two reasons:

1. Petitioners originally carried forward $670,108 of the 1973 NOL to 1976 and $238,912 of the 1973 NOL to 1978 (Pet. App. 26a). When the 1972 Tax Court case was settled these carryforwards became erroneous because NOLs are required under Section 172 of the Internal Revenue Code to be carried back and utilized to the extent

allowable and only the unused portion may be carried forward. Because Petitioners' 1972 taxable income was increased by the Tax Court settlement, no portion of the 1973 NOL was available for carryforward to 1976 or 1978. Petitioners' former counsel sought from the Internal Revenue Service an acknowledgment of this fact—an acknowledgment that the 1976 and 1978 deductions were *erroneous* and should properly be allowed in 1972—which acknowledgment would have served as a "determination" under Section 1313(a)(4) of the Internal Revenue Code. *See* Stipulations ¶ 17, Fourth Circuit Joint Appendix at 24. Only because of the Government's refusal to acknowledge officially the erroneous treatment in a form that would serve as a "determination" is the Government able to fabricate its contention that mitigation is not appropriate because "the year of the determination and the year of the proposed correction (under the mitigation statute) were the same—1972."

2. Respondent makes no effort to rebut Petitioners' observation that they can achieve a literal determination of a double disallowance of a deduction by (a) claiming the NOL deductions in a currently open year, 1984 for example, (b) having the deductions denied, (c) suing for a refund, losing and thus creating the literal determination, and (d) suing for a refund on the basis of mitigation (*See* Pet. Br. 10). In such a case, it is irrefutable that there would be a disallowance of a deduction "which should have been allowed to, but was not allowed to, the taxpayer for *another taxable year*." 26 U.S.C. § 1312(4) (emphasis added). The fact that the disallowance of the 1984 deductions would not be based upon the fact that they should have been taken in 1972 would not defeat Petitioners' entitlement to mitigation *unless* the Seventh Circuit's holding in *Olin-Mathieson Chemical Corp. v. United States*, 265 F.2d 293 (7th Cir. 1959), is wrong.

Only by refusing to acknowledge that (1) Petitioners' carryovers of the 1973 NOL to 1976 and 1978 were erro-

neous, or (2) that Petitioners can achieve a literal determination by claiming the NOL in a currently open year, can the Government support its denial of Petitioners' mitigation relief with its "no other year" theory. This "head-in-the-sand" insistence on a literal "determination" when it is patently obvious that a determination can be had is in direct conflict with *J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227 (10th Cir. 1981), and in derogation of the equitable purposes of the mitigation provisions.

Not only has the Government used this intransigence in an effort to keep tax paid by these Petitioners that they did not owe, but the Government has exhibited a clear pattern of attempting to retain similar windfalls in other cases by wearing down taxpayers through an insistence on a literal "determination" in mitigation cases. *See Republic Petroleum Corp. v. United States*, 613 F.2d 518 (5th Cir. 1980) (mitigation relief denied in first action for lack of determination) and *Cocchiara v. United States*, 779 F.2d 1108 (5th Cir. 1986) (same parties, same facts, second suit allowing mitigation). There is no way of knowing how many taxpayers simply give up rather than bring a *second* refund suit. It is time to call a halt to this gamesmanship and resolve the split between the Tenth Circuit's decision in *J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227 (10th Cir. 1981), and the Second, Fifth and Fourth Circuits' decisions in *Benenson v. United States*, 385 F.2d 26 (2d Cir. 1976); *Republic Petroleum Corp. v. United States*, 613 F.2d 518 (5th Cir. 1980); and *Longiotti v. United States*, 819 F.2d 65 (4th Cir. 1987).

Respondent acknowledges the split between *J.B.N. Telephone* on one hand, and *Republic Petroleum* and *Benenson* on the other, but contends that "this case presents no occasion to address it" (Res. Br. 7, n.4). This contention is erroneous. In *J.B.N. Telephone*, *Republic* and *Benenson*, as well as in this case, a literal determina-

tion had not yet occurred, but in each case was inevitable. The Tenth Circuit in *J.B.N. Telephone* recognized this and allowed the mitigation claim to be considered. The Fifth Circuit in *Benenson* and Second Circuit in *Republic* refused to consider the mitigation claim for lack of a determination, although a determination was inevitable. In this case, the Fourth Circuit states that it is *assuming* there has been a determination, but holds that this *unidentified* determination is not a disallowance of a deduction for one year, which deduction should have been allowed in *another*. The Fourth Circuit and the Respondent have both ignored that there is, or inevitably will be, a determination that does disallow Petitioners' NOL deductions for one year, which deductions should have been allowed in *another*. Thus, by ignoring this circumstance, the Fourth Circuit necessarily embraced the requirement that before mitigation relief can be granted, there must have been a previous, separate action creating the appropriate and literal determination. This position is directly contrary to *J.B.N. Telephone* and this issue is squarely before the Court in this case.

The conflict can perhaps be most forthrightly addressed by the Court in this case through a summary reversal of the Fourth Circuit with a remand to consider the Petitioners' mitigation claim in the light of the Tenth Circuit's decision in *J.B.N. Telephone*.

Respectfully submitted,

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